Filed 5/11/16 In re S.M. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re S.M., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. L.Q., Defendant and Appellant.	G052892 (Super. Ct. No. DP026351) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Craig E. Arthur, Judge. Affirmed.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant and Appellant.

Leon J. Page, County Counsel, Karen L. Christensen and Debbie Torrez, Deputy County Counsel, for Plaintiff and Respondent.

* * *

Pursuant to the exception set forth in Welfare and Institutions Code section 361.5, subdivision (b)(10),[1] the court denied reunification services to L.Q. (mother) in the dependency case of her son S.M., who is now nine months old. Subdivision (b)(10) allows a court to deny reunification services to a parent who (1) has suffered the termination of reunification services as to another child based on a failure to reunify, *and* (2) subsequently failed to attempt reasonably to treat the causative problems.

On appeal, mother contends the court erred by finding she failed to meet her burden of showing, pursuant to subdivision (c), that granting her services would be in S.M.'s best interests. We disagree and affirm the judgment.

FACTS

In February 2014 — over a year before S.M.'s birth — the court declared mother's four other children to be dependents after sustaining the following allegations in the section 300 petition. Mother's boyfriend R.M. (who later fathered S.M.)[2] had assaulted her on several occasions, and the children had tried to intervene. In September 2013, in the children's presence, he had choked mother with a belt around her neck until she lost consciousness. A restraining order had been issued against him, but mother had

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[1] All statutory references are to the Welfare and Institutions Code. All statutory subdivision references are to section 361.5 subdivisions.

[2] In this opinion, we refer to R.M. as "father" with respect to S.M.

failed to enforce it and had allowed him back into the family home. The home smelled bad and was infested with roaches and cluttered with trash, rotten food, and dirty laundry. Mother had left the children home alone, even though they ranged in age from one to seven years old.

Subsequently, mother participated in reunification services that included individual therapy, parenting education, personal empowerment classes, family therapy, and a 52-week intensive child abuse program.

The restraining order against R.M. did not expire until September 2016, at the earliest.[3] Nonetheless, in 2014, mother became pregnant by him. As the pregnancy progressed and mother gained weight, she lied to the Orange County Social Services Agency (SSA) and said she was not pregnant.

On the day S.M. was born, two of mother's other children were scheduled to begin a trial visit with her. Mother phoned the social worker and said she was in the hospital for a ruptured appendix. Two weeks later, the two other children began the trial visit with mother.

On July 7, 2015, during the social worker's home visit with mother, mother admitted she had given birth to S.M. When the social worker asked why mother had lied, mother said she was afraid the other two children would not be returned to her. When the social worker asked how mother had become pregnant by father despite the criminal protective order against him, mother said she had seen father at a "club" when she was drunk, and had gone with him to a motel and had sex. Mother said that father had hit her and forced himself on her. Mother admitted she had put father's name on S.M.'s birth certificate, but she claimed father was *not* at the hospital at the time of S.M.'s birth and that father did not know about the child's birth.

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[3] The record also states the order expires on January 16, 2017.

On July 9, 2015, SSA petitioned the court to declare S.M. a dependent due to mother's abuse or neglect of his half-siblings and her failure to protect him. The petition's allegations included mother's failure to enforce the restraining order against father; mother's physical abuse of a half-sibling by striking him with a sandal on his face and legs; and the status of R.M.'s half-siblings as dependents of the court.

SSA's July 9, 2015 detention report recommended that S.M. remain in mother's custody with monitored visitation for father. Mother had agreed not to allow father into her home.

On July 10, 2015, however, SSA changed its recommendation. The agency now recommended that S.M. be detained, based on new information that father had been in the delivery room, with mother's consent, when S.M. was born. The court temporarily detained S.M. from mother's custody. On July 15, 2015, after a two-day evidentiary hearing, the court adopted its temporary detention order as the permanent order, but ordered liberal supervised visits for mother.

SSA's August 5, 2015 jurisdiction/disposition report recommended reunification services for mother.

The next month, mother obtained a modification of the restraining order against father. The modification allowed her to have peaceful contact with him.

One month later, the court found true the allegations in SSA's petition, as amended by interlineation. The court scheduled the dispositional hearing for November 5, 2015.

On November 4, 2015, SSA changed its recommendation on reunification services to mother. The agency now recommended mother be denied services pursuant to section 361.5, subdivision (b)(10). SSA recommended services for father to address his aggressive behavior that put S.M. at risk.

The reasons for the change in SSA's recommendation as to mother were the following. The social worker had learned that on October 28, 2015, the court had

terminated reunification services for two of mother's other children and had scheduled a section 366.26 hearing as to them. The social worker had also learned of a domestic violence incident between mother and father on March 7, 2015, when mother was five months pregnant with S.M. Mother had phoned the police and told the responding officer that father had called her "stupid, dog," grabbed her throat, and pushed her backward toward a couch. Mother told the officer she allowed father to live at her residence despite the protective order because father had told her that if she called the police, she would be arrested too. When the social worker had recently asked mother about the March domestic violence incident, mother had denied that father had been living with her in March and had minimized the domestic violence incident.

At the November 5, 2015 dispositional hearing, the court bypassed reunification services for mother. The court noted S.M. was the youngest of mother's five children; that two of his half siblings were already placed with their father; and that as to his other half siblings, mother's reunification services had been recently terminated and a section 366.26 hearing set. The court found subdivision (b)(10) applied. The court found mother did not meet her burden of proving that granting services to her was in S.M.'s best interest.

The court ordered reunification services for father, finding that no subdivision (b) exception applied because S.M. was father's first child and father had never been offered services before. The court concluded father was legally entitled to services.

DISCUSSION

Mother contends the court abused its discretion by denying services to her. She argues the denial was not in S.M.'s best interests.

Under section 361.5, upon the "removal of a child from parental custody, the juvenile court generally must order reunification services to assist the parent to rectify the problems that led to removal. [Citations.] 'This requirement implements the law's strong preference for maintaining the family relationship if at all possible.' [Citation.] [Subdivision (b)], however, sets forth certain narrowly specified exceptions — referred to as 'reunification bypass provisions' — to the general mandate of services. The exceptions are subject to a clear and convincing standard of proof." (*In re Lana S.* (2012) 207 Cal.App.4th 94, 106.)

Under subdivision (b)'s express terms, if the court finds that an exception applies, the court "need not" order services for the parent. Despite this "need not" verbiage, however, section 361.5 does *not* afford the court the discretion to order services even if it finds that an exception applies. Rather, under subdivision (c), once the court finds that the requirements of an exception have been met, it may order services only if it finds, by clear and convincing evidence, that reunification is in the child's best interest.

The subdivision (b)(10) exception applies when (1) the court has ordered the termination of reunification services for any sibling or half sibling of the child due to the parent's failure to reunify with the sibling or half sibling, *and* (2) the parent later failed to make a reasonable effort to treat the problems that led to the removal of the sibling or half sibling. Subdivision (b)(10) reflects the Legislature's "'decision that in some cases, the likelihood of reunification is so slim that scarce resources should not be expended . . . .'" (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96.)

Mother does not challenge the court's finding that subdivision (b)(10) applied. Rather, she argues the court abused its discretion by failing to find, under subdivision (c), that reunification with her was in S.M.'s best interests.

In *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1464, the Court of Appeal recognized that section 361.5 authorizes a court to deny services once it finds that subdivision (b)(10) applies. Nonetheless, mother relies on the following statement in

Renee J.: "The failure of a parent to reunify with a prior child should never cause the court to reflexively deny that parent a meaningful chance to do so in a later case." (*Renee J.*, at p. 1464.) In substance, the foregoing statement simply recognizes that the subdivision (b)(10) requirements are twofold: Not only must the parent have failed to reunify with a prior child, but the parent must also have failed later to make a reasonable effort to rectify the causative problems. In any case, the court here took the extra step of inquiring, pursuant to subdivision (c), whether mother had met her burden to show that providing her services would be in S.M.'s best interests.

Because mother bore the burden of proof below, a variation of the substantial evidence standard of review applies on appeal: Mother must show the evidence compels a finding in her favor as a matter of law. (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1147; *Cheryl P. v. Superior Court*, *supra*, 139 Cal.App.4th at p. 96 [order denying services under subd. (b) reviewed for substantial evidence].)[4]

To make her compelling case, mother recites the following evidence. She visited S.M. twice daily to breastfeed him. S.M. has only been removed from her custody once and for a short period of time due to his young life. S.M. lives in a foster home with two of his half siblings and will be participating in six months of services with father; therefore, providing services to mother will not affect S.M.'s stability and permanency.

This evidence is not compelling. A section 366.26 hearing has been set for the two half siblings with whom S.M. is living; hence, there is no guarantee the current living arrangement will continue. S.M. was removed from mother's custody when he was three weeks old, and he has not lived with her since then. During the bulk of S.M.'s

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[4] "'[I]t is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. This follows because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case [citations].'" (*In re Aurora P.*, *supra*, 241 Cal.App.4th at p. 1156.)

day, his caregivers provide for him. Nor does a court abuse its discretion by ordering services for a father while denying them for the mother. (*In re Lana S.*, *supra*, 207 Cal.App.4th at p. 109.)

Juxtaposed against mother's slim evidentiary case is her two-year history, in SSA's words, of prioritizing "her relationship with Father over her own safety and that of her children." Mother has failed to protect her children — some of whom lay next to her in bed as father choked her with a belt until she became unconscious. S.M. was in her womb when father shoved her backward into a couch. Mother received extensive reunification services with respect to S.M.'s half siblings, but to no avail.

Substantial evidence supports the court's order.

DISPOSITION

The postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.